

*United States Court of Appeals
for the Second Circuit*



APPELLEE'S BRIEF

ORIGINAL **74-2053-54**

To be argued by
JOSEPH P. NAPOLI

United States Court of Appeals

For the Second Circuit

GEORGE KATZ,

against

Plaintiff-Appellee,

REALTY EQUITIES CORPORATION OF NEW YORK *et al.*,
Defendants-Appellees,
and

KLEIN, HINDS & FINKE and ALEXANDER GRANT & COMPANY,
Defendants-Appellants.

KENNETH I. HERMAN, Trustee F/P/O SHERIL ESTA KUPFER,
Plaintiff-Appellee,
against

REPUBLIC NATIONAL LIFE INSURANCE COMPANY *et al.*,
Defendants-Appellees,
and

KLEIN, HINDS & FINKE and ALEXANDER GRANT & COMPANY,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR PLAINTIFF-APPELLEE KENNETH I.
HERMAN, TRUSTEE F/B/O SHERIL ESTA KUPFER**

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Preliminary Statement

This appeal is from that part of a June 29, 1974 order of Honorable Milton Pollack which directed that:

“(1) The above designated actions (sometimes herein ‘constituent actions’) are hereby consolidated for all pre-trial purposes to be had during the pendency of these actions in this District in accordance with the following terms which the Court in the exercise of discretion makes applicable to

foster the efficient and proper conduct of the claims asserted in the individual complaints in the said actions.

(2) A single consolidated complaint, supplemented and amended, shall be prepared and served herein by liaison counsel which shall set forth the claims for relief asserted in the constituent actions, collated into separately stated counts by class and derivative categories as to each kind of security holders and at the head of each count shall specifically designate by name or other convenient reference the defendants against whom such count is asserted" (107a-108a).

Defendants' notice of appeal is thus limited to paragraphs one (1) and two (2) of said order of consolidation (114a). They did not appeal from paragraph nine (9) of the order which directs that the answer of each defendant shall be deemed to assert cross-claims against all the other defendants (110a), although they now allege prejudice (see appellant's brief pp. 6-7).

In addition, paragraph (1) one of the order directs "... consolidation for all pre-trial purposes . . ." (107a).

Counsel for the Appellants at the June 12, 1974 hearing stated that:

"We strongly recommend and urge consolidated discovery" (Emphasis added) (92a).

and that

"For purposes of discovery, I agree wholeheartedly, the consolidated discovery in this case is absolutely essential. I don't object to that at all . . ." (94a).

Question Presented

Did Judge Pollack err in directing the service of a single consolidated complaint for pre-trial purposes?

Statement of the Case

The full extent of Appellants' involvement with the other defendants in the violation of the federal securities law can not be determined until completion of pre-trial discovery.

The determination by Judge Pollack to order a consolidated complaint *for pre-trial purposes* was decided after his holding hearings, hearing counsel and receiving certain stipulations (107a). In fact many of the attorneys for the defendants agreed in favor of a single consolidated complaint based upon simplicity, saving in time, paperwork and energy of all parties (83a-84a, 89a, 90a-91a).

During the pre-trial hearing of June 12, 1974, in response to appellants' opposition to a single consolidated complaint for pre-trial purposes, Judge Pollack stated:

“That's the way you handle it. I have done it maybe 50 times or 100 times myself, long before I got to the court, and the defendants were very thankful that they were not facing 14 lawyers with semantics that varied 14 times to obscure the fact that there were 13 pockets” (94a).

He further stated that:

“It seems to me that the use of a single consolidated complaint need not necessarily foreclose the use of individual complaints at a trial, and in the same way as consolidated discovery would be useful and efficient, a single consolidated complaint

during the discovery and pre-trial period would be useful and efficient and could be without prejudice to unfurling the separate flags at trial, if necessary, to protect any legitimate interests that may have to be dealt with separately" (97a).

* * *

"I will order a single consolidated complaint for pretrial purposes without prejudice, as I say, to whether or not there will be a consolidated trial and without prejudice to the use of the individual complaints as they stand now at a consolidated trial, and certainly without prejudice to their use in individual trials if that should eventuate" (98a).

Thus the defendants, including appellants were asked to answer the consolidated complaint for pre-trial purposes with the original complaints being kept alive for trial purposes (101a). The court in the order of consolidation reserved until the conclusion of the pre-trial proceedings consideration of a consolidated trial (112a).

At a later hearing on September 12, 1974 Judge Pollack stated:

"The whole purpose of this complaint is to get organized for the discovery and pre-trial phase. The order that I entered specifically recites that the pleadings in each constituent action stand, and when you go back to trial, the constituent actions will determine what will be tried and how, unless when we get to the trial it is agreed that a consolidation of the constituent complaints can be made.

But for present purposes you have got to start somewhere, and the amended consolidated complaint is intended to wrap up all the claims so that we can get on with the business of discovery" (222a).

The opinion and order of the Judicial Panel on Multi-district Litigation stated in part that:

"Except for the SEC, plaintiffs in the *Synercon* and *Garrett* actions and defendants Standard & Poor's Corporation and A. M. Best Company, all parties favor transfer to a single district for co-ordinated or consolidated pretrial proceedings" (243a).

Thus even before the Multidistrict Panel, appellants supported consolidated pre-trial proceedings.

ARGUMENT

Judge Pollack did not abuse his discretion in directing a single consolidated complaint for pre-trial purposes.

Appellants' brief ignores the fact that the only issue on this appeal is whether Judge Pollack abused his discretion in directing the serving and filing of a single consolidated complaint for pre-trial purposes.

Said brief also ignores the warning by the Second Circuit in *Garber v. Randell*, 477 F. 2d 712, 717 (2nd Cir. 1973) that:

"Our decision should not be construed as implying that under no circumstances would an order directing the filing of a consolidated complaint be proper. There may be circumstances, e.g., the existence of substantially complete identity between the claims and defenses in all actions, where a consolidated complaint would be appropriate. As we said in *MacAlister*: 'We do not attempt here to prescribe a rule of universal application to orders

granting or denying consolidation' (263 F. 2d at 67)."

As previously indicated appellants "strongly recommend[ed] and urge[d] consolidated discovery" and "... agree[d] wholeheartedly, [that] the consolidated discovery in this case is absolutely essential" (92a, 94a).

They allege prejudice by arguing that they must defend against cross-claims asserted by other defendants. However, they fail to inform the court that they never raised such a claim of prejudice below, never appealed from that part of the order of consolidation directing the automatic assertion of cross-claims and ignore the fact that most likely these cross-claims would have been asserted by the other defendants.

They also allege prejudice by arguing that the class in the consolidated complaint is broader and different from the class in the original Herman complaint. If the larger class, included in the consolidated complaint, has a cause of action against the appellants, there is no reason why their claim should not be asserted either in an amendment of the original Herman complaint or in the amended consolidated complaint.

In addition, the claim against appellants is that at the inception of the scheme they failed to inform the SEC and the public of material problems between Realty and Republic (159a, 177a, 179a), that if they had, much of the damage that subsequently occurred would have been avoided.

As previously indicated the full extent of appellants' involvement can not be determined until completion of pre-trial discovery.

CONCLUSION

Based upon the admissions of appellants, their failure to show prejudice and the limiting of the consolidated complaint to the pre-trial proceeding with the original Herman complaint continuing to stand the order of the court below should be affirmed.

Respectfully submitted,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

State of New York
County of New York
City of New York-ss.:

Othell L. Williams being duly sworn, deposes and says that he is over the age of 18 years. That on the 3rd day of January, 1975, he served two (2) copies of the Brief for Plaintiff-Appellee Kenneth L. Herman, Trustee F/B/O Sheril Esta Kupfer on each of the parties and Attorneys, as per the attached schedule, by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a branch post office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York directed to said parties as indicated on the attached schedule, that being the addresses designated by them for that purpose upon the preceding papers in this action.

Othell L. Williams

Sworn to before me this
3rd day of January, 1975

Michael J. Hoops

MICHAEL J. HOOPS

Notary Public, State of New York

No. 30-1503056

Qualified in Nassau County

Commission Expires March 30, 1975

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